IN THE

SUPREME COURT of the UNITED STATES

October Term, 1979

RECEIVED
JAN 8 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 79-5962

DANNY VINCENT,

Appellant,

V.

STATE OF TEXAS,

Appellee.

On Appeal From the Texas Court of Criminal Appeals

JURISDICTIONAL STATEMENT

Of Counsel:

LEMON, CLOSE, ATKINSON,
SHEARER & McCUTCHEON

Robert D. Lemon
Robert D. McCutcheon
Dana Ehrlich
P.O. Box 1066
Perryton, Texas 79070

ATTORNEYS FOR APPELLANT

January, 1980

TABLE OF CONTENTS

	Page
Opinion Below.	1
Jurisdiction	2
Statutory Provision Involved	3
Questions Presented	4
Statement of Facts	4
The Federal Question Presented is Substantial	7
Conclusion	11
Appendix A - Opinion Below	1a
Appendix B - Statute Involved	2a
Appendix C - Rehearing Denial	3a
Appendix D - Notice of Appeal	4a

INDEX TO CITATIONS

CASES:

Douglas v. California, 372 U.S. 353 (1963)	8
Dowdy v. State, 534 S.W.2d 336 (Tex.Crim.App.--1976) . .	8
Duncan v. Louisiana, 391 U.S. 145 (1968)	3,7
Escoe v. Zerbst, 295 U.S. (1935)	9
Ex Parte Shivers, 501 S.W.2d 898 (Tex.Crim.App.--1973) .	7,8,10
Ferguson v. Georgia, 365 U.S. 570 (1961)	3
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	2,3 5-10
Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	3
Hicks v. Miranda, 422 U.S. 332 (1975)	11

Hoyt v. Florida, 368 U.S. 57 (1961) 3

Milheim v. Moffat Tunnell Improvement Dist., 362 U.S. 710 (1923) 11

Morrissey v. Brewer, 408 U.S. 471 (1972) 2,3 6-11

Tamez v. State, 534 S.W.2d 686 (Tex.Crim.App.--1976) . . 8

Whisenant v. State, 557 S.W.2d 102 (Tex.Crim.App.--1977) 6-8,10

STATUTES AND CONSTITUTIONAL PROVISIONS:

United States Constitution
Fourteenth Amendment 4,6

28 U.S.C. § 1257(2) 3

Tex. Code Crim. Proc. Ann.
art. 42.12(8) (Vernon, 1979) 2-6

OTHER AUTHORITIES:

Hippard, Annual Survey of Texas Law, 33 Southwestern Law Journal 505 (1979) 10

Wright, Miller, Cooper & Gressman, 16 Federal Practice and Procedure, §4014 Jurisdiction, (1977) 11

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1979

NO.

DANNY VINCENT,

Appellant,

V.

STATE OF TEXAS,

Appellee.

On Appeal From the Texas Court of Criminal Appeals

JURISDICTIONAL STATEMENT

THE OPINION BELOW

The per curiam decision of the Texas Court of Criminal Appeals is unpublished, 586 S.W.2d 880, (Tex. Crim. App. 1979), and appears herein as Appendix A. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Appellant Danny Vincent ("Vincent") appeals from a revocation of probation. Vincent was convicted of burglary in the 84th District Court of Ochiltree County, Texas. The court fined Vincent $2,000.00 and placed him on probation for six years. Vincent was later arrested on a complaint of driving while intoxicated, driving without a driver's license, driving with no tail lights and making excessive noise. After spending over a month and a half in jail and without a preliminary hearing, on April 10, 1978, the court revoked appellant's probation.

Article 42.12(8) of the Texas Code of Criminal Procedure ("The Statute") (please see Appendix B) does not require the State to conduct some minimal inquiry after Vincent's alleged probation violation or arrest in the nature of a preliminary hearing to determine whether there was probable cause to believe that Vincent had committed acts that violated probation conditions. It is undisputed that no such preliminary hearing was held. Appellant objected to the revocation on two grounds:

> (a) The Statute is unconstitutional on its face for failure to provide for the preliminary hearing and attendant safeguards required by the due process clause of the Fourteenth Amendment to the United States Constitution as enunciated in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973); and,
>
> (b) Vincent, in this case, was denied due process of law mandated by Morrissey and Scarpelli, where Vincent's probation was revoked without a preliminary hearing and attendant safeguards required by the due process clause of the Fourteenth Amendment to the United States Constitution as enunciated in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973).

The decision of the Texas Court of Criminal Appeals upheld the revocation and The Statute. Vincent appeals pursuant to 28 U.S.C. § 1257(2).

(ii) Vincent seeks review of the September 19, 1979 decision of the Texas Court of Criminal Appeals affirming the judgment of revocation of probation. Vincent timely filed a Motion for Rehearing en banc on September 26, 1979. Vincent's Motion for Rehearing was denied October 10, 1979. See Appendix C. The Notice of Appeal was filed in the court possessed of the original record, the 84th District Court of Ochiltree County, and in the Texas Court of Criminal Appeals. See Appendix D.

(iii) 28 U.S.C. § 1257(2) (1966) confers jurisdiction of the appeal on this Court.

(iv) Cases sustaining the jurisdiction of this Court are:

Duncan v. Louisiana, 391 U.S. 145 (1968);

Giaccio v. Pennsylvania, 382 U.S. 399 (1966);

Hoyt v. Florida, 368 U.S. 57 (1961);

Ferguson v. Georgia, 365 U.S. 570 (1961);

Gagnon v. Scarpelli, 411 U.S. 778 (1973);

Morrissey v. Brewer, 408 U.S. 471 (1972).

(v) This appeal questions the validity of Article 42.12(8), Texas Code of Criminal Procedure. Since the statutory provision 42.12(8) is lengthy, the citation is Tex. Code Crim. Proc. Ann. Art. 42.12(8) (Vernon 1979). The pertinent text of Article 42.12(8) is recited at Appendix B.

QUESTIONS PRESENTED BY THE APPEAL

(i) Whether The Statute, which does not require the State to hold any preliminary hearing to determine probable cause to believe the probationer has violated probation conditions, is unconstitutional on its face as violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

(ii) Whether The Statute, which does not require the State to hold any preliminary hearing to determine probable cause to believe the probationer has violated probation conditions is constitutional as applied to in case as violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE FACTS OF THE CASE

On May 23, 1977, Vincent pled guilty to burglary. The trial court fined Vincent $2,000.00 and sentenced him to six years in the Texas Department of Corrections. The court suspended the imposition of the prison sentence and attached as conditions of his probation that he commit no offense against the laws of Texas and refrain from drinking intoxicants.

On February 6, 1978, Vincent was arrested upon the State's Supplementary Motion for Warrant to Revoke Probation, alleging, among others, that Vincent was driving while intoxicated, and had not refrained absolutely from drinking intoxicants.

On February 6, 1978, the court set the date for the show cause hearing on the State's supplementary motion for March 27, 1978. Vincent did not receive notice of the hearing until March 2, 1978. On March 24, 1978, Robert McCutcheon was appointed counsel for Appellant upon Appellant's "Affidavit of Inability to Employ Counsel."

The Statute allows a defendant who has been arrested in respect of a probation revocation and who has not been released on bail to make a motion for a hearing on the merits to be held within twenty days of the filing of the motion to revoke. After the hearing on the merits, the court may decline to revoke, modify or revoke probation. The State undisputedly did not hold a hearing to determine probable cause. The Statute does not require it. Vincent was in jail for over a month and a half without knowing he had the statutory right to a hearing on the merits.

On March 27, 1978, three days after counsel was appointed for Vincent, Vincent filed his Motion to Quash and Special Exceptions directed to appellee's Original and Supplementary Motions to Revoke the Probation. At this time appellant challenged The Statute on the following grounds:

(a) Citing Gagnon v. Scarpelli, 411 U.S. 778, (1973), and Vincent claimed the right to a preliminary hearing, as promptly as convenient after arrest, and notice thereof, to determine probable cause of the alleged violations of probation.

(b) Vincent asserted the revocation of probation under The Statute without a preliminary hearing was expressly prohibited by the due process clause of the Fourteenth Amendment to the United States Constitution.

(c) Vincent objected that The Statute was unconstitutional on its face, and as applied to him, for failure to provide for the preliminary hearing and attendant safeguards mandated by Morrissey v. Brewer, 408 U.S. 471 (1972), ("Morrissey") and Gagnon v. Scarpelli, 411 U.S. 778 (1973), ("Scarpelli") under the Fourteenth Amendment to the United States Constitution.

The trial court overruled Vincent's constitutional objections. On April 10, 1978, the Court found that Vincent violated his probation conditions by driving while intoxicated and drinking alcoholic beverages and revoked his probation. Vincent timely appealed to the Texas Court of Criminal Appeals to review the judgment below and specifically the court's ruling on 42.12(8)(a). On such appeal, Vincent raised the identical objections as set forth above.

On September 19, 1979, the Texas Court of Criminal Appeals affirmed the judgment of the lower court. The per curiam decision stated: "Both grounds complained of the failure of the Texas system of probation to provide a preliminary hearing of the kind discussed in Scarpelli. . . . This argument was rejected in Whisenant v. State, 557 S.W.2d 102, and it does not require further discussion today." The opinion, 586 S.W.2d 880, is unpublished and is attached to this statement as Appendix A. Vincent's Motion for Rehearing en banc was denied. See Appendix C.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The Texas Court of Criminal Appeals is of the opinion that the logic and holdings of the U.S. Supreme Court in Scarpelli and Morrissey do not apply to Texas probation revocation proceedings. Ex Parte Shivers, 501 S.W.2d 898, (Tex. Crim. App. 1973). Whisenant, supra. Thus, this appeal squarely raises the question of whether the State may revoke an arrested accused's probation without an informal preliminary hearing to determine probable cause, as required by this Court's interpretation of the due process clause in Scarpelli.

In analogous situations on claims of the denial of an opportunity to be heard, this Court has entertained such substantial federal questions. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). State statutes which violate express prohibitions of the constitution and which deny due process present substantial federal questions. Duncan v. Louisiana, 391 U.S. 145 (1968), rehearing denied, 392 U.S. 947.

The constitutional precedents established by this Court directly clash with the thrice-refusal of the Texas Court of Criminal Appeals to recognize the settled constitutional doctrine as announced in Scarpelli. Although a state is not constitutionally required to provide for probation and revocation proceedings as part of its criminal procedure, if a state chooses to implement such procedures, then the due process

clause is fully applicable to the state's decision. Douglas v. California, 372 U.S. 353. (1963).

Even though the revocation of probation is not a part of the criminal prosecution, the court has held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. Gagnon v. Scarpelli, 411 U.S. at 781. Using this logic, Texas courts have granted probationers Fourth Amendment protections, Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App.--1976) and Fifth Amendment protections, Dowdy v. State, 534 S.W.2d 336 (Tex. Crim. App.--1976). Despite the recognition that the Fourth and Fifth Amendments apply to the Texas probation revocation process, the Texas Court of Criminal Appeals has consistently refused to listen to and apply Scarpelli logic to the Texas probation system. Shivers and Whisenant, supra.

This Court has not perceived a difference between the revocation of probation and the revocation of parole. In its unanimous decision, this Court affirmed the importance of the applicability of due process to probation revocation:

> "Both the probationer or parolee and the state have an interest in the accurate finding of fact and the informed use of discretion--the probationer or parolee to insure that his liberty is not unjustifiably taken away; and, the state to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation, nor imprudently prejudicing the safety of the community." Gagnon v. Scarpelli, 411 U.S. 778 at 785.

This Court in Morrissey and Scarpelli established minimum due process safeguards whenever the state attempts to revoke parole or probation. Minimum due process includes: notice to the probationer of alleged violations of probation; opportunity for the probationer to present evidence in its own behalf; a conditional right of the probationer to confront adverse witnesses; an independent decision maker, and a written report of the hearing. Such requirements serve as a substantial protection against ill-considered revocation. None of these minimal safeguards were granted Vincent in this case.

The Statute ignores one of the two important stages in the typical process of probation revocation; i.e., the informal preliminary hearing to determine probable cause. Yet probationers, like parolees, are entitled to a preliminary and a final revocation hearing under the conditions specified in Morrissey. Gagnon v. Scarpelli, 411 U.S. 778 at 783.

Probation revocation, like parole revocation, is not a stage of the criminal prosecution, but does result in a loss of liberty. Gagnon v. Scarpelli, 411 U.S. 778 at 782. This Court in Scarpelli said at footnote 4: "it is clear at least after Morrissey v. Brewer, 408 U.S. 471 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in Escoe vs. Zerbst, 295 U.S. 490 (1935), that probation is an 'act of grace'".

Nevertheless, Texas courts have consistently sought to avoid the unequivocal requirement of a preliminary hearing by

arguing that the Texas statute allows an accused probationer even more protection than the court in Scarpelli. See, Ex Parte Shivers, 501 S.W.2d 898 (Tex. Crim. App.--1973), and Whisenant v State, 557 S.W.2d 102, (Tex. Crim. App.--1977).

The requirement of an informal preliminary hearing which Scarpelli held that "probationers are entitled to" would impose no serious practical problems in probation revocation cases. This Court certainly did not intend to foreclose the states from holding both the preliminary and the final hearings at the place of violation, or from developing other creative solutions to the practical difficulties of the Morrissey requirements. Gagnon v. Scarpelli, 411 U.S. 778 at 783. Nevertheless, Texas has not even attempted to follow Scarpelli's mandate and to create a solution to the practical difficulties, if any, of the Morrissey requirements. Texas has thrice-ignored the mandate of Scarpelli. One Texas Procedure scholar has criticized Whisenant as "clearly erroneous." Hippard, Annual Survey of Texas Law, 33 Southwestern Law Journal 1, at 558 (1979).

One problem with The Statute is that, as in the present case, counsel may not be appointed for weeks after the detention of the accused. It is a rare probationer indeed who is aware of and is competent enough to handle his constitutional rights under the Texas probation statute. In the meantime, such accused probationer languishes in jail with no preliminary hearing to

determine whether probable cause exists to detain him for the alleged violation of his probation conditions.

This is a case of far-reaching effect and importance, as the Court will be able to, in the words of Mr. Chief Justice Burger in Morrissey, decide precisely "what process is due." Not only will resolution of these issues have an important effect on the administration of the probation system, but a decision will also allow the states more freedom in experimenting with appropriate probation procedures. These are issues, not frivolous, which require analysis and exposition for their resolution. Wright, Miller, Cooper and Gressman, Federal Practice and Procedure: Jurisdiction §4014, citing Milheim v. Moffat Tunnell Improvement Dist., 262 U.S. 710 (1923). A dismissal of this mandatory appeal will operate as a binding precedent on Texas and federal courts that no preliminary hearing to determine probable cause is necessary. Dismissals on the merits for lack of a substantial federal question are binding on the lower federal courts. Wright and Miller, Federal Practice and Procedure; Jurisdiction § 4014 at 638, citing Hicks v. Miranda, 442 U.S. 332 (1975).

CONCLUSION

This appeal raises issues of fundamental importance to American and Texas criminal procedure in light of the settled doctrines this Court applying due process protections to parole and probation revocation proceedings and of the increasing importance of probation in American and Texas criminal justice.

The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

LEMON, CLOSE, ATKINSON,
SHEARER & McCUTCHEON
Robert D. Lemon
Robert D. McCutcheon
Dana Ehrlich
Interstate Savings & Loan Bldg.
P.O. Box 1066
Perryton, Texas 79070
Telephone: 806-435-6544

ATTORNEYS FOR APPELLANT

R. Lemon
Of Counsel

CERTIFICATE OF SERVICE

A copy of the foregoing Jurisdictional Statement was hand delivered to William L. Rivers, Ochiltree County Attorney, and placed in the U.S. Mail, Certified, Return Receipt Requested, to the Honorable Mark White, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711.

Dated: January 7th, 1980.

Robert D. McCutcheon
Robert D. McCutcheon

APPENDIX A

OPINION OF THE
TEXAS COURT OF CRIMINAL APPEALS

OPINION

On May 23, 1977, the appellant pleaded guilty to burglary and was granted six years' probation. On April 10, 1978, his probation was revoked.

On appeal from the revocation of probation, the appellant sets forth two grounds of error. Both grounds complain of the "failure" of the Texas system of probation to provide a preliminary hearing of the kind discussed in Gagnon v. Scarpelli, 411 U.S. 778 (1973). This argument was rejected in Whisenant v. State, 557 S.W.2d 102 (Tex.Cr.App. 1977), and it does not require further discussion today.

The judgment is affirmed.

PER CURIAM OPINION
586 S.W.2d 880

DELIVERED: September 19, 1979

By: Panel No. 2, 1st Quarter, 1979

COMPOSED OF: Leon Douglas, Judge
Truman Roberts, Judge
Wendell Odom, Judge

APPENDIX B

PERTINENT PROVISION
OF THE
TEXAS CODE OF CRIMINAL PROCEDURE

Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

APPENDIX C

NOTICE OF

REHEARING DENIAL

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas OCT 10 1979

Dear Sir:

I have been instructed to advise that the Court has this day denied the Appellant's Motion for Rehearing En Banc in Cause No. 60,564 Danny Vincent

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS OF TEXAS
P. O. Box 12308, Capitol Station
AUSTIN, TEXAS 78711

MR. ROBERT D. McCUTCHEON
ATTORNEY AT LAW
P. O. BOX 1066
PERRYTON, TEXAS 79070

APPENDIX D

IN THE DISTRICT COURT FOR THE 84TH JUDICIAL DISTRICT
OCHILTREE COUNTY, TEXAS

DANNY VINCENT,	§	
	§	
Appellant,	§	
	§	
VS.	§	NO. 1494
	§	
STATE OF TEXAS,	§	
	§	
Appellee.	§	

NOTICE OF APPEAL

Appellant DANNY VINCENT gives notice of his intent to appeal from the affirmation of his probation revocation in No. 60,564 of the Texas Court of Criminal Appeals and shall take appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1257(2). Appellant appeals from final judgment entered and delivered on September 19, 1979 in No. 60,564 and from denial of Appellant's Motion for Rehearing En Banc entered on October 10, 1979. Although the original record is maintained in the above-designated court, the Appellant has also filed this Notice of Appeal with the Clerk of the Texas Court of Criminal Appeals, since a certified copy of the record was forwarded to said court in connection with the appeal from the trial court.

LEMON, CLOSE, ATKINSON,
SHEARER & McCUTCHEON
Robert D. Lemon
Robert D. McCutcheon
Dana Ehrlich
Interstate Savings & Loan Building.
P.O. Box 1066
Perryton, Texas 79070
Telephone: 806-435-6544

ATTORNEYS FOR APPELLANT

/s/ R.D. Lemon
Of Counsel

CERTIFICATE OF SERVICE

A copy of the foregoing appeal was hand delivered to William L. Rivers, Ochiltree County Attorney, and placed in the U.S. Mail, Certified, Return Receipt Requested, to the Honorable Mark White, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711.

DATE: January 4, 1980.

/s/ Robert D. McCutcheon
Robert D. McCutcheon